

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JOHN HANCOCK LIFE INSURANCE
COMPANY,

Plaintiff,

v.

VESTMONT LIMITED PARTNERSHIP,
VESTMONT LIMITED PARTNERSHIP II,
VESTMONT LIMITED PARTNERSHIP III,
and VESTERRA CORPORATION d/b/a
MONTGOMERY SQUARE PARTNERSHIP,

Defendants.

CIVIL ACTION NO. 05-11614-WGY

**PLAINTIFF JOHN HANCOCK LIFE INSURANCE COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
RENEWED MOTION FOR SUMMARY JUDGMENT
ON DEFENDANTS' COUNTERCLAIM UNDER M.G.L. c. 93A**

Plaintiff John Hancock Life Insurance Company ("John Hancock" or "Hancock") submits this Memorandum of Law in support of its Renewed Motion for Summary Judgment on the Defendants' Counterclaim under M.G.L. c. 93A, § 11 (the "Motion"). Discovery in this action is now closed, and there is no dispute but that defendants Vestmont Limited Partnership, Vestmont Limited Partnership II, Vestmont Limited Partnership III, and Vesterra Corporation d/b/a Montgomery Square Partnership (collectively, "Montgomery Partners" or the "Defendants") cannot offer admissible evidence sufficient to convince a rational trier of fact that John Hancock "made material misrepresentations in the Loan Application about the requirements for disbursement of the Loan" as alleged by the Defendants. To the contrary, the

undisputed documentary and testimonial evidence -- including the sworn testimony of the Defendants' own expert witness, Ms. Linda C. Spevacek -- establishes that John Hancock *did not* change or misrepresent the requirements for disbursement of the Loan at issue, and thus can have no liability to the Defendants under Chapter 93A. Accordingly, John Hancock is entitled to judgment on that counterclaim as a matter of law for the reasons set forth below.

Statement of Undisputed Material Facts

1. In the summer of 2004, Montgomery Partners negotiated and entered into a 70-page written loan commitment with John Hancock (the "Loan Commitment"), whereby Hancock agreed, subject to various standard and negotiated conditions, to provide Montgomery Partners with \$32 million in permanent financing on a new, 256 unit apartment complex known as "Avenel at Montgomery Square" (the "Avenel Apartments") at any time over the ensuing twelve months at a "locked" interest rate of 6.18% per annum ("Loan"). Affidavit of Timothy J. Malik Filed Pursuant to Court Order of April 12, 2006, dated April 26, 2006 ("Malik 30(b)(6) Aff."), ¶ 3.

2. In its approval process John Hancock used various internal underwriting benchmarks to assess Montgomery Partners' ability to repay, and John Hancock's risk in making, the Avenel Apartments loan. Malik 30(b)(6) Aff., ¶ 16; Affidavit of Patricia Coyne Filed Pursuant to Court Order of April 12, 2006, dated April 26, 2006 ("Coyne 30(b)(6) Aff."), ¶¶ 8-9; Affidavit of Ivor Thomas Filed Pursuant to Court Order of April 12, 2006, dated April 26, 2006 ("Thomas 30(b)(6) Aff."), ¶¶ 9-10. One of the internal benchmarks considered was the 10% constant benchmark, also sometimes referred to as the "10% breakeven" or the "10% benchmark." *Id.* To meet this particular guideline, a property's cash flow -- generally equal to its estimated net operating income ("NOI"), less any assumed cash reserve amount determined

on a per unit basis -- must be equal to 10% or greater than the loan amount funded to the borrower. *Id.* Because the assessment of the 10% Constant is a function of a property's estimated cash flow, its projected income, expenses and reserves are examined during the loan approval process. *Id.*

3. In the course of John Hancock's consideration of the application of the 10% Constant guideline, John Hancock revised its internal financials on the rental reserve and operating expenses for the Avenel Apartments. Malik 30(b)(6) Aff., ¶ 20; Thomas 30(b)(6) Aff., ¶ 17. With these changes to John Hancock's internal underwriting assumptions, the *pro forma* for the Avenel Apartments in the John Hancock confidential loan approval satisfied John Hancock's 10% Constant guideline, and did not reduce or otherwise restrict the loan funding that Montgomery Partners would receive under the existing terms of the Loan Application. Accordingly, there was no change or amendment made to the existing Loan Application. *Id.*

4. John Hancock incorporated the revised financial assumptions, including the reduced operating expenses and per-unit rental reserves, in its internal Loan Approval Form. Malik 30(b)(6) Aff., ¶ 23; Thomas 30(b)(6) Aff., ¶ 19. Hancock also noted on the first page of the Loan Approval Form that the 10% constant or breakeven was to be applied for the purpose of disbursing the Avenel Apartments loan "according to the underwriting herein," whereas the other disbursement requirements, the "75% LTV and 1.25:1 DSCR" requirements, were to be applied "as described in the [loan] commitment." *Id.* John Hancock made these notations not only to document the revised assumptions that had been made, but also to ensure that, if any question later arose, it would be clear that the 10% Constant guideline was to be applied to Hancock's revised internal assumptions as set forth in the Loan Approval Form, and not to any financial projections or information supplied by Montgomery Partners. Malik 30(b)(6) Aff., ¶ 24; Thomas

30(b)(6) Aff., ¶ 20. In this way, John Hancock was able to confirm that its internal consideration and use of the 10% Constant guideline would not inadvertently result in a reduction in the amount of loan funding available to Montgomery Partners. *Id.*

5. The 10% Constant guideline never was a term or condition of the Loan Application or Commitment but, rather, was one of several internal benchmarks used to determine whether Montgomery Partners' Loan Application would be approved by John Hancock in the first instance. Malik 30(b)(6) Aff., ¶ 26; Thomas 30(b)(6), ¶ 22. Further, because the Loan Application ultimately was approved by John Hancock with the express caveat that the 10% Constant guideline be applied, for loan disbursement purposes, to the *revised* financial projections contained in *Hancock's* confidential Loan Approval Form, Hancock's internal use of the 10% Constant guideline did not impose any additional restrictions on, or impediments to, funding the Loan. *Id.* Accordingly, there were no additional terms or conditions added to the Loan Commitment. *Id.*

6. According to Montgomery Partners' expert witness, Ms. Linda C. Spevacek ("Ms. Spevacek"), there was nothing wrong or improper about John Hancock using its own, revised financial projections to apply the 10% Constant guideline or to approve the Defendants' Loan, so long as Hancock's conduct had no financial impact on the Defendants. Transcript of Deposition of Linda C. Spevacek, dated April 21, 2006 ("Spevacek Deposition"), at 197-200 (true excerpts of which are appended to this memorandum as Exhibit A). *Id.* In addition, Ms. Spevacek confirmed that John Hancock's application of the 10% Constant guideline using the revised financial projections contained in its internal Loan Approval form *would not* have impacted Montgomery Partners' funding under the terms and conditions as set forth in the Loan Commitment in this instance. *Id.* at 193-195.

Argument

JOHN HANCOCK'S RENEWED MOTION FOR SUMMARY JUDGMENT ON THE DEFENDANTS' CHAPTER 93A COUNTERCLAIM SHOULD BE ALLOWED BECAUSE MONTGOMERY PARTNERS DOES NOT POSSESS, AND CANNOT OFFER, ANY ADMISSIBLE EVIDENCE TO ESTABLISH THAT HANCOCK CHANGED OR MISREPRESENTED THE REQUIREMENTS FOR DISBURSEMENT OF THE LOAN AT ISSUE.

Summary judgment should be granted where "there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A genuine issue of fact exists only if, on the evidence presented, a reasonable jury could return a verdict in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, in opposing a motion for summary judgment, the non-moving party "may not rest upon mere allegation or denials of his pleading." *Id.*, 477 U.S. at 256, 106 S.Ct. at 2514. Rather, the nonmoving party must establish a trial-worthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir.1993).

In this case, Montgomery Partners alleges in Count VI of its Second Amended Counterclaim that John Hancock engaged in unfair or deceptive acts or practices under M.G.L. c. 93A, § 11, because Hancock purportedly "made material misrepresentations in the Loan Application about the requirements for disbursement of the Loan." Second Amended Counterclaim, ¶ 59. More specifically, Montgomery Partners alleges that John Hancock imposed a "10% constant" requirement with the knowledge that Montgomery Partners "would not meet this requirement for disbursement of the Loan." *Id.*, ¶¶ 29-30.

Montgomery Partners has no admissible evidence, however, to support this counterclaim. To the contrary, the undisputed evidence in this case is that Hancock's internal use of the 10% Constant guideline in evaluating the Defendants' Loan, when applied "according to the underwriting" figures contained in its confidential Loan Approval form as plainly stated on the face of that form, *would not* have impacted Montgomery Partners' funding under the terms and conditions agreed-to by the parties in the Loan Commitment. *See* Statement of Undisputed Material Facts, *supra*, ¶¶ 3-5. Even the Defendants' own expert witness, Ms. Spevacek, admits this fact. *Id.*, ¶ 6. It also is undisputed that John Hancock made the foregoing notation on the face of its internal Loan Approval form not only to document the revised assumptions that had been made, but also to ensure that, if any question later arose, it would be clear that the 10% Constant guideline was to be applied to Hancock's revised assumptions as set forth in the internal Loan Approval Form, and not to any financial projections or information supplied by Montgomery Partners. *Id.*, ¶ 4. In this way, John Hancock was able to confirm that its internal consideration and use of the 10% Constant guideline would not inadvertently result in a reduction in the amount of loan funding available to Montgomery Partners. *Id.*

These undisputed facts leave no room for any conclusion but that John Hancock did not make any "material misrepresentations in the Loan Application about the requirements for disbursement of the Loan" and, thus, did not violate Chapter 93A in its dealings with the Montgomery Partners as a matter of law. *See Cheswell, Inc. v. Premier Homes and Land Corp.*, 319 F. Supp.2d 135, 142 (D. Mass. 2004) (summary judgment granted on 93A claim when bank did not engage in any unfair or deceptive acts or practice as a matter of law).

Conclusion

For the foregoing reasons, John Hancock respectfully requests that the court enter summary judgment in John Hancock's favor on the Defendants' counterclaim under M.G.L. c. 93A, § 11, as a matter of law.

JOHN HANCOCK LIFE INSURANCE
COMPANY

By its attorneys,

/s/ Brian A. Davis

Brian A. Davis (BBO No. 546462)

Paul D. Popeo (BBO No. 567727)

Elizabeth A. Castellani (BBO No. 663818)

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Date: April 28, 2006

4076100v1

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 28, 2006.

/s/ Brian A. Davis

Brian A. Davis

EXHIBIT A

ESQUIRE DEPOSITION SERVICES

Page 1

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3
4 JOHN HANCOCK LIFE : CIVIL ACTION
INSURANCE COMPANY : No. 05-11614-WGY

5 :
6 v. :
7 VESTMONT LIMITED :
PARTNERSHIP, et al :

8 - - -
9 April 21, 2006
10 - - -

11 Videotaped oral deposition of
12 LINDA SPEVACEK, taken pursuant to notice,
13 was held at the law offices of WHITE &
14 WILLIAMS, One Liberty, 18th Floor,
15 Philadelphia, Pennsylvania, beginning at
16 10:04 a.m., on the above date, before
17 Nancy D. Ronayne, a Professional Court
18 Reporter and Notary Public in the
19 Commonwealth of Pennsylvania.
20 - - -

21
22 ESQUIRE DEPOSITION SERVICES
Four Penn Center
23 1600 John F. Kennedy Boulevard-12th Floor
Philadelphia, Pennsylvania 19103
24 (215) 988-9191

ESQUIRE DEPOSITION SERVICES

Page 2

1 APPEARANCES:

2

3 CHOATE HALL & STEWART, LLP

4 BY: BRIAN A. DAVIS, ESQUIRE

5 Two International Place

6 150 Oliver Street

7 Boston, Massachusetts 02110

8 (617) 248-5000

9 Representing the Plaintiff

10

11 BUCHANAN INGERSOLL, PC

12 BY: C. RANDOLPH ROSS, ESQUIRE

13 1835 Market Street

14 14th Floor

15 Philadelphia, PA 19103

16 (215) 665-3957

17 Representing the Defendants

18

19 ALSO PRESENT: Jason Hoffmann

20 Videographer

21 - - -

22

23

24

Page 4

1 - - -

2 DEPOSITION SUPPORT INDEX

3 - - -

4

5 Direction to Witness Not to Answer

6 Page Line Page Line Page Line

7 (NONE)

8

9

10 Request for Production of Documents

11 Page Line Page Line Page Line

12 82 6

13

14

15 Stipulations

16 Page Line Page Line Page Line

17 (NONE)

18

19

20 Question Marked

21 Page Line Page Line Page Line

22 (NONE)

23

24

Page 3

1 - - -

2 INDEX

3 - - -

4 Testimony of: LINDA SPEVACEK

5 PAGE

6 By Mr. Davis 6

7 - - -

8 EXHIBITS

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Page 5

1 THE VIDEOGRAPHER: Good

2 morning. We're now on the record.

3 My name is Jason Hoffman, I'm a

4 videographer employed by Esquire

5 Deposition Services, 1600 JFK

6 Boulevard, 12th Floor,

7 Philadelphia, Pennsylvania 19103.

8 This is a video deposition for the

9 United States District Court,

10 District of Massachusetts.

11 Today's date is April 21, 2006 and

12 the time is 10:04 a.m. This

13 deposition is being held at White

14 and Williams in Philadelphia,

15 Pennsylvania in the matter of John

16 Hancock Life Insurance Co., versus

17 Vestmont Limited Partnership, et

18 al.. The deponent is Linda

19 Spevacek. Present today, all

20 counsel will be noted on the

21 stenographic record. And the

22 court reporter will now swear in

23 the witness.

24 - - -

2 (Pages 2 to 5)

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<p>Page 6</p> <p>1 LINDA SPEVACEK, after having 2 been duly sworn, was examined and 3 testified as follows: 4 - - - 5 DIRECT EXAMINATION 6 - - - 7 BY MR. DAVIS: 8 Q. Good morning, Ms. Spevacek. 9 A. Good morning. 10 Q. My name is Brian Davis. I'm 11 attorney representing John Hancock in 12 this matter. Welcome. You have been 13 designated as an expert in this matter; 14 is that right? 15 A. Yes. 16 MR. ROSS: Speak up. 17 BY MR. DAVIS: 18 Q. Have you testified as an 19 expert before? 20 A. I have never testified as an 21 expert witness before. 22 Q. What is your current home 23 address? 24 A. My current home address is</p>	<p>Page 8</p> <p>1 document in the past? 2 A. I don't believe I've seen 3 this, I don't recall seeing this 4 document, no. 5 Q. If you take a look at the 6 second page of Exhibit 1. Do you see 7 that it says, Hancock further demands the 8 production of the following documents by 9 the deponent, Ms. Spevacek, in advance of 10 her deposition; do you see that? 11 A. I do. 12 Q. Do you see the list of 13 documents there? 14 A. Yes. 15 Q. Have you seen that list 16 before? 17 A. Not in this form, no. 18 MR. ROSS: Could I help some 19 misunderstanding there? 20 MR. DAVIS: You can try. 21 MR. ROSS: She didn't see it 22 because I read it to her. 23 BY MR. DAVIS: 24 Q. Let's go through the various</p>
<p>Page 7</p> <p>1 24 Holcomb Ridge, West Granby, 2 Connecticut 06090. 3 Q. And your current business 4 address? 5 A. Current business address is 6 64 Pratt Street, Hartford, Connecticut 7 06103. 8 Q. Why don't we mark this as 9 Exhibit 1, please. 10 (Spevacek-1 marked for 11 identification.) 12 MR. ROSS: Spevacek-1? 13 MR. DAVIS: Correct, I'm 14 going to ask the court reporter to 15 mark them with her name and a 16 number. 17 BY MR. DAVIS: 18 Q. Ms. Spevacek, you have what 19 has been marked as Exhibit 1. Have you 20 seen that document before? 21 A. I'm not sure. 22 Q. This is a notice of 23 deposition for your deposition in this 24 matter. You don't recall seeing this</p>	<p>Page 9</p> <p>1 categories here for a moment, Ms. 2 Spevacek and see if you searched for and 3 produced all of these documents. The 4 first category of documents you were 5 instructed to produce were all documents 6 reviewed, consulted, examined by you in 7 forming your opinions in this action. 8 Have you produced all of those documents? 9 A. I have produced all of those 10 documents. 11 Q. And second category is all 12 documents actually relied upon you in 13 forming your opinions. Have you produced 14 all of those? 15 A. Yes, I have. 16 Q. The third is all -- all 17 documents constituting or concerning any 18 partial or complete drafts of any report 19 or opinion issued by you in this action. 20 Have all of those documents been 21 produced? 22 A. I have submitted a draft to 23 Buchanan Ingersoll, counsel for Vesterra. 24 I do not know whether or not that was</p>

3 (Pages 6 to 9)

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<p style="text-align: right;">Page 190</p> <p>1 -- that's the number that the borrower 2 cares about, right, how much they're able 3 to borrow at the effective gross income, 4 correct? 5 A. Correct. 6 Q. So looking again at example 7 number two across these two documents, we 8 see in the Exhibit 1 to the loan 9 commitment that at an effective gross 10 income of \$4,208,191 that it was 11 projected that the borrower would receive 12 funding of \$29,090,000, correct? 13 A. Yes. 14 Q. And under the examples of 15 reserve calculations contained in 16 Exhibit 9 using the revised projections 17 that Hancock came up with we see that at 18 the same gross -- effective gross income 19 number that the loan funding amount would 20 be \$29,138,000; do I have that correct? 21 A. You do but again, the -- 22 this number, the numbers on -- 23 MR. ROSS: This? 24 THE WITNESS: The numbers on</p>	<p style="text-align: right;">Page 192</p> <p>1 expect a ten percent constant would be 2 applied, correct? 3 A. I don't know about the 4 parties. The applicant certainly was not 5 subject to that, but John Hancock was 6 because it was in their guidelines. 7 Q. So in looking at Exhibit 1 8 to the loan commitment and looking under 9 example two, at what Mr. Koller and Mr. 10 Kelly and Mr. Palopoli were expecting 11 based on your knowledge was that at an 12 effective gross income level of 13 \$4,208,191 that they would receive 14 funding of approximately \$29,090,000, 15 correct? 16 A. Yes. 17 Q. And that an effective gross 18 income level of \$4,505,240 that they 19 would receive funding of 32 million? 20 A. Yes. Without application of 21 the ten percent constant. 22 Q. And if I have it correct Mr. 23 Malik's calculations that were reflected 24 in Exhibit 9 demonstrate that at the same</p>
<p style="text-align: right;">Page 191</p> <p>1 Exhibit 1 to the application have 2 not yet been subjected to the 10 3 percent constant so these may have 4 been reduced. 5 BY MR. DAVIS: 6 Q. Well, there's no call in the 7 loan commitment for application of a ten 8 percent constant, correct? 9 A. Yes, that's -- that's the 10 problem. 11 Q. So what I'm trying to 12 confirm through this exercise with you is 13 that at the same effective gross income 14 levels for the property that the loan 15 funding amounts would not have varied or 16 at least they wouldn't have been reduced, 17 do you agree with that based on what you 18 see in Exhibit number 9? 19 A. If we caveat that with -- 20 without applying the 10 percent constant 21 to the numbers in Exhibit 1 then there 22 would have been no changes. 23 Q. And when the parties entered 24 into this loan commitment they did not</p>	<p style="text-align: right;">Page 193</p> <p>1 effective gross income levels that Mr. 2 Koller, Mr. Kelly and Mr. Palopoli would 3 receive at least the same amount and 4 perhaps more funding? 5 A. Except that on the bottom of 6 page 9 there is a calculation that says 7 maximum loan at 10 percent constant, it's 8 on the Malik exhibit and it is not in 9 this exhibit, and were it in this exhibit 10 then the funding amounts would be 11 different. 12 Q. But -- 13 A. As they stand they are the 14 same. 15 Q. If you use the numbers that 16 Hancock employed in its internal 17 underwriting you would agree with me that 18 it does not reduce the amount of funding 19 available to these borrowers, correct? 20 MR. ROSS: Exhibit 9, you 21 mean? Exhibit 9, I was confused 22 between when you said these 23 numbers and these numbers. 24 MR. DAVIS: I'm referring to</p>

49 (Pages 190 to 193)

ESQUIRE DEPOSITION SERVICES

<p style="text-align: right;">Page 194</p> <p>1 the numbers contained in 2 Exhibit 9. 3 THE WITNESS: Yes, and I 4 guess I'm saying not all the 5 numbers are reflected on 6 Exhibit 1, not all of the 7 calculations. 8 BY MR. DAVIS: 9 Q. Understood, but that's not 10 my question. 11 A. Okay. 12 Q. My question is that looking 13 at Exhibit 9, if you use the numbers 14 contained in Exhibit 9, then the amount 15 of borrowing, the amount of funding 16 available to these borrowers was the same 17 across or slightly greater across the 18 same effective gross income? 19 A. Without applying the 20 constant, yes, that is correct. 21 Q. Well, this document 22 Exhibit 9 applies the 10 percent constant 23 using the revised numbers; does it not? 24 A. Yes, it does, but this one</p>	<p style="text-align: right;">Page 196</p> <p>1 MR. DAVIS: Do you want to 2 take a break? 3 MR. ROSS: Yes, sure. 4 (A break occurred.) 5 THE VIDEOGRAPHER: We're 6 back on the record, time is 2:28. 7 BY MR. DAVIS: 8 Q. Ms. Spevacek, would you take 9 a look again at your report which is 10 Exhibit 2 on page 15. 11 A. All right. 12 Q. And there's a reference 13 there at the bottom of page 15 to the 14 revisions that were developed to, quote, 15 make the numbers work, close quote, are 16 detailed in Exhibit C of this report. 17 Did you prepare Exhibit C? 18 A. Yes, I did. 19 Q. And where did you get that 20 information that's reflected in Exhibit 21 C? 22 A. I believe the -- the 23 document numbers are noted here, so 24 that's where I got the information.</p>
<p style="text-align: right;">Page 195</p> <p>1 doesn't. 2 Q. Again, I'm not asking you 3 about Exhibit 1 to the loan commitment 4 right now. 5 A. Okay. All right. 6 Q. I'm asking you about Exhibit 7 9 which is, as I represented to you, Mr. 8 Malik's calculations of the application 9 of the 10 percent constant using the 10 revised projections that Hancock 11 employed? 12 A. Uh-huh. 13 Q. So we get it absolutely 14 clear. Applying the 10 percent constant 15 using those revised projections as 16 reflected in Exhibit 9, it did not reduce 17 the amount of funding available to these 18 borrowers across the same effective gross 19 income levels, correct? 20 A. Yes. Yes. According to 21 these numbers. 22 MR. ROSS: Are you between 23 exhibits, we've been about another 24 hour now?</p>	<p style="text-align: right;">Page 197</p> <p>1 Q. Now, you mentioned here that 2 many of those revisions were not in 3 accordance with John Hancock's lending 4 guidelines. By those revisions you mean 5 the Hancock's revisions to the projected 6 financials; is that right? 7 A. Yes. The revisions to the 8 -- yes, the revisions to the financials 9 in the approval document. 10 Q. It says that were not in 11 accordance with Hancock's lending 12 guidelines. You will agree with me 13 however that Hancock had the ability or 14 the discretion to modify or alter its 15 lending guidelines if it wished to do so, 16 correct? 17 A. Yes, I would agree with 18 that. 19 Q. And including in the 20 borrower's favor if Hancock wishes to do 21 that, correct? 22 A. Yes, if they wish to. 23 Q. There's nothing improper 24 about Hancock doing that, correct?</p>

50 (Pages 194 to 197)

ESQUIRE DEPOSITION SERVICES

<p style="text-align: right;">Page 198</p> <p>1 A. Well, what's -- what's 2 unusual if not improper would be to 3 reduce -- would be -- to increase the 4 prospective net operating income in an 5 underwriting process is quite unusual but 6 not prohibited. 7 Q. Not improper? Doesn't hurt 8 the borrower to increase -- 9 A. No. 10 Q. -- the net operating income, 11 does it? 12 A. No, but I'm thinking 13 somewhat internally because not 14 everything is documented well and so 15 there could be some improper -- let's say 16 improper documentation of the changes 17 that were made. 18 Q. You saying that that could 19 hypothetically happen or that did happen? 20 A. No, that did happen. That 21 did happen. 22 Q. You think that these changes 23 were improperly documented internally at 24 Hancock?</p>	<p style="text-align: right;">Page 200</p> <p>1 impact, financially impact the borrowers, 2 correct? 3 A. Yes, thank you. 4 Q. Looking on page 17 of your 5 report. The very last line on page 17 6 says, there is no doubt in my mind that 7 at closing the disbursement -- this 8 disbursement requirement would have been 9 evaluated against the applicants' 10 submitted and certified property 11 operating financials; do you see that? 12 A. I do. 13 Q. First when you say this 14 disbursement requirement, you're talking 15 about the 10 percent constant or 16 10 percent breakeven, correct? 17 A. Yes. 18 Q. What is the basis for your 19 belief that -- that that requirement 20 would have been evaluated against the 21 borrowers' submitted and certified 22 property operating financials? 23 A. As is typical of an industry 24 closing and is called for within John</p>
<p style="text-align: right;">Page 199</p> <p>1 A. Yes. 2 Q. What leads you to believe 3 that? 4 A. Not all of the changes that 5 were made were noted as they should have 6 been in the guidelines and there's two 7 sets of numbers in this second approval 8 document, which is potentially a cause 9 for concern. 10 Q. Are you aware of anyone 11 within Hancock who believes that these 12 changes were not properly documented? 13 A. No, I'm not. 14 Q. And would it matter to these 15 borrowers if Hancock properly or 16 improperly internally documented changes 17 that it was making in favor of the 18 borrowers? 19 A. Changes to the numbers, it 20 would not matter; changes to the 21 requirements of the loan, yes, it would 22 matter. 23 Q. Changes to requirements of 24 the loan that it had the potential to</p>	<p style="text-align: right;">Page 201</p> <p>1 Hancock's policies and procedures, at 2 closing, prior to closing the borrower 3 must submit actual property operating 4 figures in order to prove up that the 5 property is earning enough to -- to 6 qualify for the loan funds or the various 7 reserve amounts that are structured 8 within the documents. And also within 9 John Hancock's policies is a requirement 10 that those cash flows provided by the 11 borrower at closing based on actual 12 property figures are to be evaluated 13 against the approval documents within 14 John Hancock. 15 Q. Now, would you agree with me 16 that between you and the people who are 17 actually going to perform this closing 18 that the people who were actually going 19 to perform this closing for Hancock would 20 know better as to what the 10 percent 21 constant would be applied against if at 22 all for purposes of closing this loan? 23 A. Sorry. You're going to have 24 to break that one down.</p>

51 (Pages 198 to 201)